IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: A212/21

In the matter between

MOOLID ALI FIRST APPELLANT
AHMED ABDULLE SECOND APPELLANT

And

THE STATE RESPONDENT

Heard 25 November 2021

JUDGMENT delivered 25 November 2021

THULARE AJ

[1] This is an appeal by both appellants against the decision of the Magistrate of Bellville to dismiss their application to be granted to bail. The accused were charged with two counts, to wit, unlawful possession of a firearm and unlawful possession of ammunition, both counts were in contravention of the provisions of the Firearms

Control Act, 2000, (Act No. 60 of 2000). The application fell within the purview of Schedule 5 of the Criminal Procedure Act, 1977 (Act No. 55 of 1977) (the CPA).

[2] Both appellants were undocumented foreign nationals or illegal foreigners. Both alleged that their country of origin was Somalia and that they had to flee because a terrorist organization in their country, Al Shabaab, had threatened to kill them. The first appellant alleged that he had been residing at [….], Bellville since February 2020 whilst the second appellant alleged that he had been residing at the same address for eleven months as at the date of their application for bail, to wit, 5 January 2021. The owner of the resident was a family friend. Both alleged that they did not have alternative addresses, but that the Somali community would be able to obtain alternative addresses for them if required. Both had not yet approached the Department of Home Affairs to apply for refugee status. Second appellant's reason was that Home Affairs was closed due to lockdown.

[3] The first appellant was 28 years of age, married and had four minor children. His wife and children were in Somalia. The second respondent was 18 years old, unmarried and had one child who was in Somalia with the mother. Both were unemployed and did not own any assets. They had no previous convictions or pending cases. They did not know the complainant or any state witnesses. The firearm was found in the shop but not on their person. They intended to plead not guilty but did not wish to disclose the basis of their defence. They could each afford R1500-00 for bail. Although they were both healthy, they were stressed and panicked because of the Covid-19 pandemic. The second appellant was exposed and had to self-isolate, which was difficult due to overcrowding in prison.

[4] The State opposed bail. Members of the South African Police Services (SAPS) were tipped off by a member of the public and followed up on the information. The information led them to a shop at […], Bellville South. Both appellants were found at the shop. The firearm was found in the shop in the presence of both appellants. The appellants faced serious charges and if convicted would be sentenced to long terms of imprisonment. An immigration officer, provided with the personal details of the appellants, searched on the National Immigration System. There were no records

that any of the appellants had applied for asylum seeker's permit in the Republic of South Africa. Both appellants were in the country illegally.

[5] The parties agreed that the application fell within Schedule 5 of the CPA. The magistrate's judgment was seven sentences in one paragraph:

"I am not going to make a long sing and dance about this. This is a Schedule 5 opposed bail application. You have a duty to convince me that it is not in the interest of justice for me to order that you remain in custody. There are a few factors that counts against you. One, that you are here illegally. Two, that you have no proof that you have approached Home Affairs for Asylum Seeker Permits. Three, you have denied possession, physical possession of the firearms, but you do not deny that the firearms were found in your presence. You have not convinced me in terms of what was required. The provisions of Schedule 5, bail is denied."

[6] One of the factors for consideration in this application, and which from the record, appeared to have troubled the magistrate, was the status of the accused in the country. It forms the first two factors that are referred to in the judgment. Immediately after the prosecutor announced that it was the state case, the record reads as follows before judgment:

"COURT: Do you want to address me on the allegation, Ms Tovey, that it is alleged here that they are here illegally?

MS TOVEY ADDRESSES COURT: As the Court pleases your Worship. The Court will note by both accused, or both applicants own submission in their affidavits, they have stated that they are in the country and that they need to approach Home Affairs … [intervention]

COURT: How did they get here?

MS TOVEY: May I take instruction Your Worship? As the Court pleases.

COURT: And when did they get here and how?

MS TOVEY: As the Court pleases. (Ms Tovey takes instructions). May I address the Court Your Worship?

COURT: Yes.

MS TOVEY: I have taken instructions with the assistance of the interpreter and my instructions are as follows: The accused got here around the beginning of February. And their instructions … [intervention]

COURT: This year?

MS TOVEY: 2020 Your Worship.

COURT: Right.

MS TOVEY: February 2020. My instructions are further that both accused feared for their lives and as a result of not having any documentation and just fleeing their country, that they had to cross the border Your Worship.
COURT: So they are here illegally?
MS TOVEY: Confirm Your Worship.
COURT: On what basis should I then consider even granting them bail?
MS TOVEY: Your Worship, both of the accused –I have taken this instruction as well, and I have informed them that it is a big issue. However, my instructions was to proceed. Both of the accused feared for their life.
COURT: That may be so. They have feared for their lives in their country. I have no issue with that. They are here now. They are here unlawfully. They are here since February. Lockdown started at the end of March. What did they do in between two months in terms of applying for asylum seeker permits?
MS TOVEY: Your Worship, I have taken an instruction. But I would like to confirm, I do not want to mislead the Court Your Worship.
COURT: No, I am not expecting you to do that, but I think there needs to be an explanation if you arrived here in February, lockdown started at the end of March. What have you done?
MS TOVEY: I confirm Your Worship. May I turn my back to the Court?
COURT: Yes.
MS TOVEY: If I may Your Worship. The instruction from both accused is that they did make several attempts between when they arrived in Cape Town and before lockdown to approach Home Affairs, but as a result of the queues being excessively long and not being able to be assisted at the end of the day, they did however attempt on a number of occasions to …
COURT: The important point is, that they are here unlawful. What prevents them from leaving as they came in.
MS TOVEY: Your Worship, as per the affidavit of the investigating officer. He does submit that their residential address is [….] in Bellville-South. This has also been submitted by both accused.
COURT: That is the address of a family friend. It is not their addresses? It is not their property? That is where they reside while they are here, unlawfully.
MS TOVEY: As the Court pleases Your Worship.
COURT: And that is my concern. They arrived here unlawfully, without papers. And the allegation is made that they attempted to regularize their unlawful stay here. Nothing is before me to show that they actually did that, except for the mere allegation. And then they arrived here unlawfully. How do I know, releasing them on any amount of bail- it does not really matter- that they will not just disappear in the same way that they disappeared from

Somalia. Why would I want to risk that? My concern is, here they are found – or the allegation is that they are found in possession of firearms. They dispute that it was found, the dispute that it was found on their person. They are not disputing the fact that it was found in their presence, or in the shop, or wherever. They are not disputing that. They are just disputing the fact that it was veer found on their person. So that is a problem. That is a problem. And in terms of the provisions of Schedule 5, they are supposed to convince me that it is not in the interest of justice to have them incarcerated.

MS TOVEY: I understand Your Worship, that was my advice to both accused with the assistance of the interpreter. I am just following instructions Your Worship.

COURT: It is one thing to follow instructions. It is another thing to be realistic and actually apply the law. But I will do that for you. I understand your position. But please, I am not arguing …[intervention]

MS TOVEY: I understand Your Worship.

COURT: I am not doing anything to your case, I am just trying to understand what your case is. And if your case is as you have put it, there is a problem. And I so not think that they met the standards required by Schedule 5. That is my view at this stage, unless you have anything else to say?

MS TOVEY: I have nothing further to add at this point Your Worship.

COURT: Thank you. Mr Nizam.

PROSECUTOR: Your Worship, I am going to address Your Worship. At the end of the day, as the Court … [intervention]

COURT: It is still too long. Burt carry on.

PROSECUTOR: As the Court have indicated …

COURT: Let us not waste each other's time.

PROSECUTOR: The onus is on the applicants and when one has regard to the provisions of section 60(4) the likelihood, … [indistinct] should they be released … [indistinct]

COURT: Thank you. You may stand gentlemen."

[7] Section 65(4) of the CPA provides that:

"65 Appeal to superior court with regard to bail

(4) The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given."

[8] The appellants were arrested by members of the SAPS. A member of the SAPS who arrest a person has a duty to establish the name and address of the person arrested [section 41(1) of the CPA]. The SAPS has a duty to verify the name and address of the person arrested, and may by law utilize up to twelve (12) hours with the person in their detention in pursuit of verification of personal particulars. In my view, where the person is a foreign national, verification of personal details should necessarily include the status of the person in the Republic. An arrested person who alleged that they had fled their country of origin for fear of persecution should trigger the preamble to the Refugees Act, 1998 (Act No. 130 of 1998) (the RA) in the minds of the law enforcement officers, public prosecutors and judicial officers. The detention of such person for allegedly having committed an offence, that is, in terms of the CPA, does not absolve the state to determine that person's status.

[9] The preamble read as follows:

"Whereas the Republic of South Africa has acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law, ..."

[10] The RA allowed for the detention of an alleged asylum seeker pending the finalization of an application for asylum [section 23]. The detention was for a period not longer than was reasonable and justifiable and if it was for a period longer than thirty (30) days, was subject to judicial review by a magistrate [section 29]. Amongst other general rights of refugees was the formal written recognition of their status [section 27A(a)] and the right to remain in the Republic [section 27A(b)], both rights were pending finalization of their application for asylum. The asylum seeker was also entitled to the rights contained in the Constitution of the Republic of South Africa, 1996, in so far as those rights applied to an asylum seeker [section 27A(d)]. An asylum seeker was entitled to apply for asylum [section 21] and to be issued with an asylum seeker visa allowing him or her to remain in the Republic temporarily, subject to conditions where necessary, pending adjudication of their application for asylum [section 22] The principles and rights provided for in the RA, in my view, were

adequate guidance to the State and the Magistrate on how to approach an arrested person who claimed to be an asylum seeker in the Republic.

[11] Section 9(1) in Chapter 2 of the Constitution read as follows:

"Equality

9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law."

Section 7(1) and (2) of the Constitution reads:

"Rights

7 (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

The Magistrate was under a Constitutional duty to be independent and subject only to the Constitution and the law, which he must apply impartially and without fear, favour or prejudice [section 165(1) of the Constitution]. This duty of the Court, and the obligations of the State, are not suspended by the mere fact that the person sought to be brought or who was appearing before the court was an undocumented foreign national. It is the duty of the courts, in upholding our country's obligations towards the nations of the world to which we deliberately bound ourselves, to ensure that foreign nationals enjoy the equal protection and benefit of the laws of the Republic.

[12] In *S v Dlamini; S v Dladla and Others, S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC) (1999 (4) SA 623; 1999 (7) BCLR 771) it was said at para 11:

"[11] Furthermore a bail hearing is a unique judicial function. It is obvious that the peculiar requirements of bail as an interlocutory and inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal court procedure it is considerably less formal than a trial. Thus the evidentiary material proferred need not comply with the strict rules of oral or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. An important point to note here about bail proceedings is so self-evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of

possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial and that entails in the main protecting the investigation and prosecution of the case against hindrance."

[13] It would have been advisable if the Magistrate stood the matter down to allow the defence to adequately address the status of the accused. It remains unknown what the address of the Prosecutor would have been, as the Magistrate simply denied the Prosecutor an opportunity to address the court, as the State was entitled to. Had the Magistrate allowed himself to be led by amongst others the arguments of the public prosecutor, it may be that justice would have prevailed. In *S v Mabena and Another* 2007 (1) SACR 482 (SCA) at para 7 it was said as regards a bail application:

"The form that an inquiry and evaluation should take is not prescribed by the Act, but a court ought not to require instruction on the essential form of a judicially conducted inquiry. It requires at least that the interested parties- the prosecution and the accused – are given an adequate opportunity to be heard on the issue. For although a bail inquiry is less formal than a trial, it remains a formal court procedure that is essentially adversarial in nature. A court is afforded greater inquisitorial powers in such an inquiry, but those powers are afforded so as to ensure that all material factors are brought to account, even when they are not presented by the parties, and not to enable a court to disregard them. And while a judicial officer is entitled to invite an application for bail, and in some cases is even obliged to do so, that does not make him or her the protagonist. A bail inquiry, in other words, is an ordinary judicial process, adapted as far as need be to take into account of its peculiarities, that is to be conducted impartially and judicially and in accordance with the relevant statutory prescripts."

[14] Section 60(3) of the CPA provides as follows:

"60 Bail application of accused in court

(3) If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court."

On a proper consideration of the case, the Magistrate did not have reliable and important information necessary to reach a decision on the question whether the appellants were refugees in terms of the laws of the Republic of South Africa [S v

Green and Another 2006 (1) SACR 603 (SCA) at 610c]. Against the background of the Covid-19 pandemic and the resultant Prescripts and Regulations issued by the State through announcements by the President, Ministers and Departments to limit movements and access to government buildings, including the Department of Home Affairs which administers the RA, it was incumbent upon the Magistrate to ensure that the appellants had access to the services of a Refugee Reception Officer designated by the Director-General in the Department of Home Affairs as well as related services in terms of the RA, for a proper determination. In my view the Magistrate was wrong to refuse bail, without more.

[15] It is apposite to conclude this judgment with the expression from the highest court in the land in *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) at para 20:

"The very fabric of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity."

[16] For these reasons I make the following order:

(a) The appeal succeeds.

(b) The order of the Magistrate is set aside and replaced by the following order:

1. No order on the bail application is made at this stage.
2. The State is ordered to assist both appellants to present themselves before a Refugee Reception Officer within five (5) working days of this order.
3. The matter is remitted back to the Magistrate for a decision, on whether or not to grant bail, to be made thereafter.

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DM THULARE

ACTING JUDGE OF THE HIGH COURT